

BOARD OF APPEALS CASE NO. 5454

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BEFORE THE

APPLICANTS: Charles & Robert Scheuerman

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ZONING HEARING EXAMINER

**REQUEST: Variance to permit an existing
pavilion within the required rear yard setback;
2800 Belair Road, Fallston**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 12/1/04 & 12/8/04

HEARING DATE: February 7, 2005

Record: 12/3/04 & 12/10/04

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ZONING HEARING EXAMINER'S DECISION

The Applicant/Owner, Robert Scheuerman and the Co-Applicant/Lessee Charles Scheuerman, are requesting a variance pursuant to Section 267- 39B, Table XII of the Harford County Code, to reduce the 35-foot rear yard setback (2 foot proposed) in the B3/General Business District.

The subject property is located at 2800 Bel Air Road, Fallston, Maryland 21047, in the Third Election District, and is more particularly identified on Tax Map 55, Grid Number 4C, Parcel 72. The parcel contains approximately 0.991 acres.

The Co-Applicant, Charles Scheuerman, appeared and testified that he owns Fast Eddie's Pit Beef, which he has operated from a leased nonconforming building on the subject property for nine years. The back corner of that building is three to five feet from the rear property line. The witness further testified that the subject property, has approximately 450 feet of frontage on Bel Air Road, and ranges in depth from 102 feet at the north end, to 30 feet at the south end where his business is located.

Mr. Scheuerman was granted an area variance in 1999 (Board of Appeals Case No. 4818), to construct a restroom adjacent to the existing nonconforming building. The picnic tables located in the area of the subject variance were already in place at the time of that hearing. The Applicant erected a pavilion over the picnic tables in August of 2004. The property owner subsequently received a violation notice (Applicant's Exhibit 3) because the referenced pavilion was constructed without a valid building permit. That notice was forwarded to the witness for resolution. Mr. Scheuerman spoke with Mr. Truit, Chief of the Building Services Division, and agreed to pay all required fees and obtain all necessary permits. However, he was advised that he could not request a building permit because the pavilion did not comply with existing setback requirements. He was instead instructed to request a demolition permit and an area variance. The demolition permit was introduced as Applicant's Exhibit 5. The variance request resulted in the subject hearing.

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Mr. Scheuerman testified that prior to constructing the pavilion, he had placed canvas tents over the picnic tables to shield his customers from the elements. The tents either collapsed due to rainwater accumulation, or blew over during inclement weather. Fearing that the tents would either injure a patron, or blow into Bel Air Road and impede traffic, he replaced them with a permanent pavilion. He did not obtain a building permit because he did not realize he needed one for a structure with no walls or plumbing.

The witness indicated that it was impossible to comply with the 35 foot setback on the portion of the property where his business is located. The lot is so narrow at that point that the pavilion would have to be placed either in the middle of the parking lot, or within the Bel Air Road right-of-way. He testified that the pavilion has no detrimental impact on surrounding properties because the adjoining rear parcel is wooded, and the subject property is otherwise surrounded by commercial uses. Mr. Scheuerman also testified that denial of the requested variance would result in unreasonable hardship for his business, because his customers would have no place to eat, except in their vehicles, or outside in an unsheltered area.

During cross-examination by counsel for adjoining property owner, Mr. Stanley Lloyd, Mr. Scheuerman agreed that the area designated on the site plan as "Future Pit Beef," was drawn in after the original plan was drafted. When questioned about the decision in Board of Appeals Case No. 4818, he acknowledged the condition stating that the setbacks authorized therein "shall not be further reduced." He also acknowledged that the pavilion is several inches closer to the Lloyd property than the existing bathroom. Mr. Scheuerman verified that he had not obtained building permits before pouring the concrete pad in 1999, or constructing the subject pavilion in August of 2004. He further stated that before the concrete pad was poured the picnic tables sat on crusher run.

The Applicant's second witness was Jacquelyn Magness Seneschal, a duly qualified expert professional land planner, and senior associate in community and environmental planning with KCI Technologies. The witness is a former Harford County Department of Planning and Zoning employee. Ms. Seneschal testified that she had reviewed the Application, Staff Report and Attachments, and prior zoning decisions and Staff Reports regarding the subject property. She stated that she is familiar with the property, had conducted a site visit, and personally photographed the parcel and existing improvements. Her curriculum vitae was admitted as Applicant's Exhibit 6, her Report and Analysis was admitted as Applicant's Exhibit 7, and the site photographs were collectively admitted as Applicant's Exhibit 8.

The witness testified that the parcel contains .991 acres and is zoned B3. The existing buildings are nonconforming, and the site was previously utilized as a motel. The property is located outside the development envelope in an area designated as high intensity. It is surrounded by intense commercial uses. Ms. Seneschal stated that the subject property is unique because of its long narrow configuration. The parcel is almost triangularly shaped, with a squared off point at the southern end. It varies in width from 30 feet at the westernmost point to 102 feet at the easternmost point. She indicated that there is no way any building could be constructed on the western end of the property, where the Applicant's business is located. Even on the widest portion of the property it would be impractical to construct a viable commercial structure while observing all required setbacks.

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Ms. Seneschal also testified that the requested variance would cause no detriment to adjoining property owners because the subject pavilion is a natural extension of the existing commercial building, fills in a vacant area, creates a straight facade, and makes the building more aesthetically appealing. She stated that the photographs on Pages 1 and 2 of Applicant's Exhibit 8 show the straight line and pleasing facade presented by the pavilion. The photographs on Page 3 of that Exhibit show a similar facade, except the rear of the pavilion juts out slightly from the existing storage shed due to the patio's rectangular shape. The witness indicated that the proposed variance would not detrimentally impact adjoining properties because the existing use is consistent with other uses in the surrounding neighborhood, and the parcel directly to the rear is undeveloped.

Ms. Seneschal also testified that the proposed variance would not impair the purpose or intent of the code, because the use is consistent with existing commercial uses along Route 1, and fast food restaurants commonly contain covered outdoor seating areas. The witness stated that she had considered the requested variance in light of the limitations guides and standards set forth in Harford County Code Section 267-9I, and opined that the proposed use would cause no adverse impact to adjacent properties based on the standards set forth in that section. According to Ms. Seneschal, any additional site visits generated by the pavilion's presence would have a minimal impact on traffic along heavily traveled U.S. Rt. 1. She emphasized that the picnic tables covered by the subject pavilion were in place when the decision in Board of Appeals Case Number 4818 was issued.

On cross-examination, Ms. Seneschal acknowledged that she did not use a survey, or conduct a title search as part of her report and analysis. She described the area in front of Fast Eddie's Pit Beef as a concrete pad, but indicated that the Applicant could not have constructed the pavilion there because it would not have met setback requirements. When asked about the decision in Case No. 4818, the witness acknowledged that Condition No. 3 provided that there would be no further setbacks. She also admitted that the pavilion may encroach slightly further into the rear setback than the existing bathroom. On redirect, the witness testified that the conditions set forth in Board of Appeals Case No. 4818 apply to the restroom at issue in that case, rather than the subject variance.

Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, appeared and testified regarding the findings of fact and recommendations made by that agency. The department recommended denial of the subject request in its January 20, 2005 Staff Report. According to Mr. McClune, the Department did find the subject property unique based upon its unusual configuration. However, it determined that there was insufficient evidence to support the granting of the requested variance based on practical difficulty or undue hardship. The witness testified that there are three separate businesses located on the subject property, all of which can continue operating without the granting of the requested variance.

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Mr. McClune stated that the subject pavilion is not required for the operation of Applicant's business, and indicated that Applicant's expert testified that the requested variance would create no additional traffic at the site. He therefore concluded that no additional business would be generated by the granting of the requested variance. Although he acknowledged that seating facilities are permitted accessory uses in the B3 District, Mr. McClune testified that most fast food or carry out businesses do not have seating facilities. He also noted that the Applicant had failed to indicate whether any other building on the property could be used for indoor seating.

The witness agreed with Ms. Seneschal that based on the limitations guides and standards set forth in the Harford County Code, the requested variance would cause no adverse impact to adjoining properties. However, he also opined that the requested variance exceeds the minimum adjustment necessary to prevent hardship or practical difficulty to the Applicant/owner because there are already three businesses operating on the subject property.

On cross examination, Mr. McClune differentiated Board of Appeals Case No. 4818 from the subject case by pointing out that there, the bathroom was required by the Health Department for continued operation of Applicant's business, while the subject pavilion is not. He acknowledged that there is no practical place to build an outdoor seating area for patrons of Fast Eddie's Pit Beef on the portion of the property leased by the Co-Applicant/Lessee, but reiterated that most fast food restaurants do not have seating facilities. The witness further testified that it is unusual for a one acre B3 parcel to accommodate three separate businesses while meeting all existing setback requirements. Mr. McClune also noted that Applicant's ability to operate Fast Eddie's Pit Beef on the subject site several years, without a covered pavilion, played into the Department's decision, that a pavilion was not necessary for the operation of his business.

Mr. Joseph C. Thompson, a duly qualified expert land surveyor, testified in opposition to the Application on behalf of adjoining property owner, Mr. Stan Lloyd. Mr. Lloyd owns the unimproved parcel directly to the rear of the subject property. Mr. Thompson, indicated that he had taken field measurements and conducted a survey of Mr. Lloyd's property in connection with the subject Application. Based on the results of that survey, he testified that Fast Eddie's Pit Beef is approximately 475 feet long. The adjacent bathroom, constructed pursuant to Board of Appeals Case No. 4818, is 4.8 feet from Mr. Lloyd's property line at its closest point. The concrete pad, which is approximately 24 ½ by 23 ½ feet in diameter, is 3.9 feet from Mr. Lloyd's property line at its closest point. It encroaches 9 inches further into the setback than the existing bathroom. The referenced survey was admitted as Protestant's Exhibit 1. On cross-examination, Mr. Thompson stated that he did not perform the actual survey, although he was present on site when it was conducted. He also acknowledged that the concrete pad does not encroach onto the Lloyd property.

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CONCLUSION:

The Applicant/Owner, Robert Scheuerman and the Co-Applicant/Lessee Charles Scheuerman, are requesting a variance pursuant to Section 267- 39B, Table XII of the Harford County Code, to reduce the 35-foot rear yard setback (2 foot proposed) in the B3/General Business District.

Section 267-26C(6) of the Harford County Code makes the following provisions with regard to accessory uses:

- A. Generally. Except as otherwise restricted by this Part 1, customary accessory structures and uses shall be permitted in any district in connection with the principal permitted use within such district. Private roads and driveways shall be permitted in any district as an accessory use to any principal use when located in the same district as the principal use.
- B. Zoning certificate required. Accessory uses specified in this section require the issuance of a zoning certificate. Any accessory use not specified in this section does not require a zoning certificate.
- C. Use limitations. In addition to the other requirements of this Part 1, an accessory use shall not be permitted unless it strictly complies with the following:
 - (5) Uses and structures.
 - d) Business, industrial, institutional and continuing care retirement community uses: same front, side and rear lot lines as required for the principal structure.

Section 267-11 of The Harford County Code, permits the granting of variances stating:

- A. [V]ariances from the provisions or requirements of this Part 1 may be granted if the Board finds that:
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."

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- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.

The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of *Cromwell v. Ward*, 102 Md. App. 691, (1995). This test can be summarized as follows. First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique if a peculiar characteristic or unusual circumstance, relating only to the subject property, causes the zoning ordinance to impact more severely on that property than on surrounding properties. *Cromwell, supra*, at 721. If the subject property is found to be unique, the trier of fact may proceed to the second step, and determine whether literal enforcement of the zoning ordinance, with regard to the unique property, would result in practical difficulty or unreasonable hardship to the Applicant.

As stated by the Court of Special Appeals in *North v. St. Mary's County*, 99 Md. App. 502, 638 A.2d 1175 (1994),

“The ‘unique’ aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. “Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions.” In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.” *North, supra* at 99 Md. App, 514.

The Hearing Examiner finds that the subject property is unique. The parcel is approximately one acre in size, with approximately 450 feet of road frontage along U.S. Route 1. It is exceptionally long and narrow, ranging in depth from 102 feet at the northwestern end to 30 feet deep at the southwestern end. This unique configuration causes the zoning ordinance to impact more severely on the subject property than on similarly situated properties because compliance with existing setback requirements prevents the construction of a viable commercial building on the parcel, and prevents the construction of any building on the portion of the property where the Co-Applicant’s business is located.

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The Hearing Examiner finds that literal enforcement of the zoning ordinance with regard to the unique property would create practical difficulty for the Co-Applicant/Lessee, Charles Scheuerman. Much of Mr. McClune's testimony in opposition to the requested variance centered around his assertion that the Applicant/Owner would experience no practical difficulty if the requested variance was denied. He based this contention on the fact that there are three separate businesses located on the subject parcel, all of which can continue in operation without the granting of the requested variance. However, he failed to identify the three businesses and this testimony contradicts the Application, and Staff Report (p.2) both of which indicate that the subject parcel contains only two businesses, namely Fallston Gun and Pawn Shop, and Fast Eddie's Pit Beef.

With regard to potential practical difficulty claimed by the Co-Applicant, Mr. McClune strongly emphasized that the subject pavilion is not required for the operation of Fast Eddie's Pit Beef. He stressed that Mr. Scheuerman's ability to operate his business on the subject site for several years without a covered pavilion impacted the Department's decision, that a pavilion was not necessary to the conduct of his business. He also differentiated the decision in Board of Appeals Case No. 4818 by noting that the restroom in that case was required by the Health Department for the continuation of Applicant's business.

"The Court of Appeals has recognized a distinction between a use variance, which changes the character of the zoned district, and an area variance, which does not. Use variances are customarily concerned with "hardship" cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with "practical difficulty." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md App. 28, 39, 322 A. 2d 220, 227 (1974) *quoting Loyola Loan Ass'n v. Buschman*, 227 Md. 243, 248, 176 A.2d 355, 358 (1961). Harford County, allows the granting of an area variance upon a showing of either practical difficulty or unreasonable hardship.

"Where the standard of "practical difficulty" applies, the applicant is relieved of the burden of showing a taking in a constitutional sense, as is required under the "undue hardship" standard. In order to justify the grant of an area variance the applicant need show only:

- (1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
- (2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

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- (3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured." *Anderson, supra* at 22 Md. App. 40, *quoting McLean v. Soley*, 270 Md. 208, 214-15, 310 A.2d 783, 787 (1973), *quoting* 2 Rathkopf, *The Law of Zoning and Planning*, 45-28-29 (3d ed. 1972).

Both Ms. Seneschal and Mr. McClune testified that existing setback requirements render it impossible to construct *any* structure on the portion of the property where Mr. Scheuerman's business is located. Mr. McClune agreed that the inability to provide a sheltered eating area for his customers admittedly presents a hardship from the Applicants' point of view, but testified alternately that fast food restaurants, carry-outs, and/or delis do not typically have seating facilities. Ms. Seneschal on the other hand testified that fast food restaurants commonly contain covered outdoor seating areas.

The existing picnic tables were present at the subject location when Board of Appeals Case No. 4818 was decided. In fact, their presence there necessitated obtaining a variance to construct the adjacent restroom. The Applicant's undisputed testimony indicated that prior to erecting the subject pavilion, he provided his customers with shelter from the elements by erecting canvas tents over the existing picnic tables. The tents either blew over, or collapsed, due to rainwater collection during inclement weather. They had to be removed for safety reasons. This created a practical difficulty for the Co-Applicant.

Mr. McClune also testified that the Co-Applicant failed to prove there were no other buildings on the subject property which could be used to provide indoor seating facilities for his business. As depicted on the site plan, the subject property contains only a small well building, an 8 x 8 foot shed, Fallston Gun and Pawn Shop, Fast Eddie's Pit Beef, and an one additional building located between the gun shop and pit beef stand. According to the Staff Report (p. 2-3) "[a] section of the building between the gun shop and the pit beef business has been removed with only the foundation block remaining." It therefore appears highly unlikely that there is any available space on the subject parcel in which Mr. Scheuerman could construct an indoor eating area.

Valid accessory uses are permitted in the B3 District. The Hearing Examiner accepts Ms. Seneschal's testimony that fast food restaurants commonly contain covered outdoor seating areas. Denying the requested variance would therefore prevent Mr. Scheuerman from providing a common amenity to his customers.

The Hearing Examiner finds that the requested relief does not exceed the minimum adjustment necessary to relieve the practical difficulty to the Co-Applicant which would result if the zoning ordinance were strictly enforced with regard to the unique parcel. Allowing the requested unenclosed pavilion is a minimally intrusive method of ameliorating the aforesaid practical difficulty. The picnic tables have been present at their existing location, under the subject pavilion, since before the 1999 decision in Board of Appeals Case No: 4818. The Department of Planning and Zoning testified in favor of the Application in that case. The pavilion is located at the rear of the subject parcel, adjacent to a wooded lot, and encroaches only 9 inches further into the setback than the existing restroom.

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Finally, The Hearing Examiner finds that the granting of the requested variance will not be detrimental to either adjoining properties, or the intent of the Code. The Hearing Examiner accepts the testimony of both Ms. Seneschal and Mr. McClune that based on the limitations guides and standards set forth in Harford County Code Section 267-9I, the requested variance would not cause any adverse impact to adjoining properties. The only opposition testimony was presented by adjoining property owner, Mr. Stan Lloyd, who showed that the subject pavilion encroaches 9 inches further into the rear setback than the adjacent restroom. However, Mr Lloyd failed to indicate how, or even if, this creates any adverse impact on his property. There is obviously a longstanding dispute between the Applicants and Mr. Lloyd involving collateral matters, such as the possible encroachment of sewer lines and/or grease traps from the subject property into the Lloyd property. These issues, would be more appropriately addressed in a court of law, are not relevant to the subject variance request.

For the reasons set forth above, the Hearing Examiner recommends approval of the subject Application, subject to the following conditions:

1. That the Applicants obtain all necessary permits and inspections for the existing construction.
2. That the Applicants not encroach further into the setback than hereby authorized.
3. That the concrete pad shall not be enlarged, and the existing pavilion shall not be enlarged or enclosed without prior Board approval.

Date: March 21, 2005

Rebecca A. Bryant
Zoning Hearing Examiner